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Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

ORGANIZATION OF WORK

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. LEANZA (Italy), referring to the topic of State liability for acts not prohibited by international law, the subject of chapter V of the Commission's report (A/51/10), said that there was some debate among experts as to whether lawful acts could in certain cases give rise to international liability and an obligation to provide compensation for harm. The issue involved mainly activities typical of modern industrial societies, such as those connected with nuclear power plants, the chemical and space industries and maritime transport of petroleum and other dangerous or polluting substances, which certainly had undeniable political and economic value, but also posed a considerable risk for the safety of human beings and protection of the environment. Such activities, whether conducted on land, or on ships, aircraft or space objects belonging to a State, could cause harm in other States or in areas which were not under the jurisdiction of any State in particular. Although States were free to carry out or permit dangerous activities in their territory or other areas under their jurisdiction, the question remained as to whether they should be responsible for harm caused to other States or common areas in such cases.

2. The trend in international law in the area under consideration would seem to indicate that a general rule had developed which required States to avoid harm or the risk of harm as a result of the activities in question. He recalled Principle 21 adopted at the United Nations Conference on the Human Environment, held in Stockholm in 1972, and reaffirmed in many General Assembly resolutions and in Principle 2 of the Rio Declaration on Environment and Development. Violating that general rule would lead to all the consequences normally associated with committing an internationally unlawful act, including compensation for harm or, in the case of activities which involved risks, putting an end to the unlawful activity.

3. Nevertheless, application of the primary rule, the prohibition of transboundary pollution, and of the secondary provisions on liability in cases of violations, did not suffice in itself to guarantee compensation for the harm caused in all cases. In fact, it did not seem possible to define that rule in absolute terms, by holding that there had been a violation simply because harm had been caused. The rule should be defined in relative terms, with a State being liable for an internationally lawful act only if it had not acted with reasonable diligence, taking into account the circumstances. The situation became even more complicated if one considered that not only States, but also, and above all, individuals, carried out such activities and the consequences of the activities could not always be attributed to a State.

4. That uncertainty, especially the need to formulate precise rules in relation to some categories of dangerous activities, had led to the signing of several international conventions, such as the 1972 Convention on International Liability for Harm Caused by Space Objects. Liability for lawful acts was also the subject of article 22 of the 1958 Geneva Convention on the High Seas as well

as of article 110 of the 1982 United Nations Convention on the Law of the Sea. Subsequently, States had endeavoured to facilitate compensation for individuals who had suffered as a result of such acts through their own domestic legislation and to establish special strict or absolute liability regimes.

5. That had been the situation of uncertainty and constant change in international rules in which the International Law Commission had had to act in order to establish a liability regime governing lawful activities. The working group set up to study the topic had submitted a report containing 22 draft articles with commentaries thereto (A/51/10, annex I), which represented great progress. The draft articles were very logical and complete, since they contained not only general rules but also specific provisions on prevention and compensation.

6. The scope of the draft should be broadened, so as to cover not only activities not prohibited by international law which involved a risk of causing significant transboundary harm, but also other activities not prohibited by international law which did not involve a risk of causing significant transboundary harm, but which nonetheless caused such harm (art. 1 (b)). There was no reason to limit the scope of the draft, particularly the general principles and rules on compensation, to certain dangerous activities, since industrial and technological activities which did not involve an appreciable risk could also cause significant harm. It would be preferable not to include in article 1 a list of activities not prohibited by international law. Any such list would run the risk of being incomplete and would have to be updated regularly, given scientific and technological progress which increased the risk of transboundary harm. In addition, except in the case of some specific activities, the risks and harm which might arise from an activity depended basically on the manner in which it was carried out and its context.

7. He stressed the importance of draft article 3, which indicated that the freedom of States to carry out activities in their territory was not unlimited, since it was subject to the general obligation to prevent or minimize the risk of transboundary harm, a principle which constituted the basis for liability for lawful acts. That article set out a general rule of international law (see, for example, the arbitral award of 11 March 1941 in the Trail Smelter case and Principle 21 of the Stockholm Declaration on the Human Environment). Italy also endorsed the wording of draft article 4, under which all States must take appropriate measures to prevent or minimize the risk of transboundary harm. That was an obligation of "due diligence" and not of result, in accordance with State practice and international jurisprudence.

8. In draft article 5, on liability for transboundary harm, it would have been preferable to state the principle of compensation with greater clarity and precision. That article should be coordinated with the articles in chapter III, which stipulated that compensation for harm should be subject to negotiations between the State of origin and the affected State, in accordance with the principle that the victim of harm should not be left to bear the entire loss. That view resulted from an overly limited conception of liability for lawful acts, which should be modified in the context of chapter III of the draft as well. The principle of cooperation laid down in draft article 6 was essential for determining the best way to prevent or minimize the risk of causing

significant transboundary harm. It was wise to enlist the aid of international organizations, which were the ideal forum for reconciling the conflicting interests of States, as long as their intervention did not present an obstacle to risk prevention and reduction. Draft articles 9 to 19 were in keeping with international practice as reflected in treaties and in the pronouncements of international organizations and other non-binding international instruments. Italy agreed that the obligation of prevention gave rise to consequences relating principally to the extent of compensation. The principle of liability for lawful acts must be kept separate from that of liability for unlawful acts, which was the result of a violation of the primary rule.

9. In draft articles 20 to 22, two procedures were established to enable the injured parties to obtain compensation: pursuing claims in the courts of the State of origin, or through negotiations between the State of origin and the affected State or States. In any case, the negotiation procedure should be based on the rule of subsidiary liability of the State of origin for that portion of the harm which was not covered by the liability of the operator of the activity. The question of transboundary harm, particularly harm to the environment, must be studied in depth. The concept of environmental harm was dealt with as a special case in various domestic legal systems and also at the international level, for example, in the United Nations Convention on the Law of the Sea and the Convention on the Regulation of Antarctic Mineral Resource Activities.

10. Mr. MAHNIČ (Slovenia), referring to the topic of State succession and its impact on the nationality of natural and legal persons (A/51/10, chap. IV), said that he would first like to address two issues of a general nature: the Commission's recommendation to separate the question of the nationality of natural persons from that of legal persons, and the proposal that the result of the work on the nationality of natural persons should take the form of a declaration of the General Assembly. His delegation understood the logic of considering the two questions separately and the proposed priority to be given to the issue of the nationality of natural persons, which involved human rights. However, in some cases of State succession the nationality of legal persons might affect the property rights of individuals and thus human rights as well. The economic consequences of State succession for individuals would not be determined fully unless the issue of the nationality of legal persons was thoroughly studied.

11. The question of the form the document should take, should be addressed at a later stage. A declaration might not be the most appropriate form, since the document should contain only general principles of State succession. In order to elaborate the obligations of States or lay down rules on specific situations regarding State succession, it would be better to draft a legally binding document, preferably a convention.

12. As to the basic principles which the Commission proposed to include in the future instrument (para. 86 of the Commission's report), it would not be easy to achieve an appropriate balance, since some of the issues involved were sensitive and far-reaching. Slovenia would therefore reserve its final position while awaiting a careful study. It had doubts with regard to principle (d); currently, legal rules did not provide for the right of individuals to dual or

multiple nationality, and it therefore seemed odd to suggest that there should be an "obligation" on the part of States to give consideration to the will of individuals to acquire the nationality of two or several States. A more cautious approach to that principle was needed.

13. Since the wording of principle (f) was also unclear, his delegation would await the Commission's commentary on the subject. The right of option was the right to choose between two nationalities in particular circumstances, if so determined between the States concerned on the basis of an international agreement. Consequently, there was no general obligation on the part of States to grant the right of option to individuals in cases of State succession, nor was there a legal basis for an individual to opt for a second or third nationality. The exercise of the right of option, if granted, should be limited to a certain period after the date of succession. With regard to the proposal contained in subparagraph (h), there was already a rule on acquired rights in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, which was relevant to the principle in question.

14. The subject of reservations to treaties (chap. VI) was of great technical and practical importance, particularly for the legal departments of ministries of foreign affairs. It would therefore be useful to prepare a guide for Governments on the reservations regime. Slovenia had responded to the questionnaire prepared by the Special Rapporteur and intended to reply to the other questions. It agreed with the Special Rapporteur's suggestion to elaborate a guide to practice in respect of reservations in the context of the general law of treaties, as reflected in the respective Vienna Conventions.

15. He welcomed the thorough and constructive examination of the Commission's programme, procedures and working methods contained in chapter VII of the report. His Government intended to study the relevant recommendations with a view to making specific comments. As to the future work of the Commission, Slovenia had a preference for the topics of diplomatic protection and unilateral acts of States, which were relevant to the conduct of international relations. It therefore supported the codification and progressive development of international law in that area.

16. Mr. NGUYEN DUY CHIEN (Viet Nam) said that the work of the International Law Commission at its forty-eighth session had in general been satisfactory, especially its work on the draft Code of Crimes against the Peace and Security of Mankind. On the other hand, its work had also revealed differences of opinion as to which crimes should or should not be included in the Code. The Commission's decision to reduce the number of crimes from 12 to 5 did not affect the value or effectiveness of the draft, which characterized those crimes against the peace and security of mankind that were objectively most serious. Aggression, genocide, crimes against humanity and war crimes, because of their gravity, were at the top of the list of crimes against the peace and security of mankind.

17. Lastly, his delegation hoped that the Commission would soon conclude its work on the topic of State responsibility, one of its most difficult items.

18. Mr. BERMAN (United Kingdom of Great Britain and Northern Ireland) said that the report of the Commission on the work of its forty-eighth session was of high quality and its content was organized and easy to use. He hoped that the Commission would continue in that direction. Nevertheless, it would be useful to have the conclusions and recommendations of the Commission earlier.

19. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was devoid of substance. Article 3 of the draft articles provided that "the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited". Furthermore, that freedom also was subject in article 3 to a general obligation and specific legal obligations. That was another way of saying that sic utere tuo ut alienum non laedas was a substantive rule of customary international law and that the breach of that obligation might entail liability according to the normal rules of State responsibility. His delegation drew three conclusions from that: first, provisions on prevention, although useful, were not appropriate material for a code; second, the provisions on liability begged so many questions that the Sixth Committee could not support them even if there were no separate draft articles on State responsibility; third, to add the cases tentatively mentioned in draft article 1 (b) would aggravate the situation. For all those reasons, the Commission should cease considering the topic, given the burden it imposed on the Commission.

20. With regard to State succession and its impact on the nationality of natural and legal persons, he endorsed the Commission's request for authority to undertake a substantive study of the topic entitled "Nationality in relation to the succession of States", even on the ambitious timetable suggested in paragraph 88 (c) of the report. However, instead of recommending that the result of the work on the question of the nationality of natural persons should take the form of a declaration of the General Assembly, as was recommended in paragraph 88 (b) of the report, the Commission should be free to select whatever form it deemed appropriate in the course of its substantive study.

21. With regard to reservations to treaties, his delegation noted that the Special Rapporteur had provided a thoughtful analysis of whether reservations to treaties required a "normative diversification" under which different reservations regimes would apply to different types of treaties. As the Special Rapporteur had rightly noted, the International Court of Justice, when it had laid the foundation for the "Vienna regime" in its Advisory Opinion on "Reservations to the Convention on Genocide", had already been dealing with a human rights treaty par excellence and had referred to that specific fact in its Opinion. Accordingly, the Commission should be encouraged to press ahead with its efforts to bring similar clarity to other aspects of that confused area of international law and State practice. The Special Rapporteur had judiciously reserved his view for the moment on whether a guide to practice would be needed. His delegation assumed that the Special Rapporteur would deem it necessary.

22. He was pleased that the Commission had completed its work on the draft Code of Crimes against the Peace and Security of Mankind. It seemed natural that the Commission's draft should be used as source material by the Preparatory Committee on the Establishment of an International Criminal Court. However, there was no justification for continuing work on the Code separately and

independently, as that would risk ending up with two separate texts with divergent definitions.

23. He welcomed the conclusions and recommendations in the Commission's report, many of which dealt with matters over which the Commission should have maximum autonomy vis-à-vis the Sixth Committee. The Commission had carefully looked back on the habits and practices of the past in order to distinguish the elements which must be preserved from those which should be adapted or even abandoned. In doing so, the Commission had thrown down a challenge to the General Assembly and specifically to the Sixth Committee. The Commission was entitled to be critical of the Committee's muffled and sometimes misleading responses of the past. It was necessary to decide whether the traditional debates in the Sixth Committee and the General Assembly resolutions to which they led provided the Commission with the dialogue it needed.

24. In its analysis of the relationship between codification and progressive development, the Commission concluded that the distinction between the two was "difficult if not impossible to draw in practice, especially when one descends to the detail ... necessary ... to give more precise effect to a principle". It was hard to object to that conclusion. However, there remained a difference in the text of article 15 of the Commission's Statute. In any event, it was necessary to bear in mind that codification was a process designed to pin down the unique "right solution" which represented what the law was at a given moment. Progressive development, on the other hand, necessarily entailed an element of choice as to how the law should develop; various solutions were possible, none uniquely right. It was possible that over the years the Commission, in omitting the distinction, had been disguising that element of choice. It would be preferable for the Commission to acknowledge the element of choice, identify the choices and explain the criteria. That would not only make the entire process of choice and recommendation more transparent, but would also enable the Commission to point out to Governments the consequences of the various choices. Moreover, the Commission would be able to state its own preferences, which would facilitate the dialogue between the Sixth Committee and the Commission.

25. With regard to the Commission's long-term programme of work, his delegation believed that the Commission should begin work on the new topic of diplomatic protection. In the case of unilateral acts of States, a study should be undertaken to enable the Commission and the Committee to determine whether there was sufficient material for a useful project. Lastly, the Commission should not take up the topic of ownership and protection of wrecks beyond the limits of national maritime jurisdiction since the topic fell within the mandate of other specialized bodies.

26. Mr. WIBISONO (Indonesia) underscored the fact that the Commission had concluded the second reading of the draft Code of Crimes against the Peace and Security of Mankind. That was of particular importance in the light of recent international events and the fact that the topic had been under consideration in the United Nations for more than 50 years. There was a close link between the draft Code and the establishment of an international criminal court, and the two topics should be considered together in order to ensure an effective and internationally acceptable criminal justice system. In addition, the draft Code

should take the form of an international convention, so that it would result in a legally binding instrument for the States that ratified it.

27. He agreed with article 1, paragraph 2 of the draft Code that crimes "against the peace and security of mankind are crimes under international law". However, it could not agree with the latter part of the same paragraph which provided that those crimes would be punishable as such, whether or not they were punishable under national law. Where national law did impose a penalty, national authorities should exercise jurisdiction.

28. The definition of the crime of aggression, genocide, crimes against humanity and crimes against United Nations and associated personnel and war crimes posed problems and merited careful consideration. His delegation supported the inclusion of crimes against United Nations and associated personnel in the Code since, in recent years, their security had been greatly threatened. The international community had a responsibility to ensure the prosecution of individuals who committed criminal attacks against United Nations and associated personnel when national authorities were incapable of doing so. In that regard, a myriad of issues would have to be clarified and reviewed, including jurisdiction, extradition, penalties and rules of evidence, in order to establish an international system that would complement the Charter of the United Nations and national criminal justice systems.

29. With regard to the question of State responsibility, he said that the commentary on countermeasures in the report stated that they might be necessary to ensure compliance with its legal obligations on the part of a wrong-doing State. Countermeasures, however, should not be viewed as a satisfactory legal remedy because each State considered itself as the judge of its rights in the absence of negotiated or third party settlement and because of the unequal ability of States to take or respond to them. In that context, the scope of the regime should be restricted and narrowly defined since it could lend itself to abuse of weaker States. The goal of countermeasures was not to be punitive, but should be reparation or restitution. A voluntary third party dispute system including a regime of countermeasures was indispensable to weaker States under contemporary international law.

30. Referring to the question of reservations to treaties, he said that the Commission had decided that its work should take the form of a guide to assist States and international organizations with regard to reservations. That would avoid unnecessary confusion and facilitate the solving of specific problems arising in connection with the Vienna Conventions without resorting to rigid legal provisions. Furthermore, the guide would serve to promote the unilateral ratification of multilateral treaties without undermining traditional values and national legislation. In that regard, his delegation noted the contents of the Commission's draft resolution on reservations to normative multilateral treaties including human rights treaties, which would be taken up at its next session.

31. With regard to chapter VII, on other decisions and conclusions of the Commission, it was undeniable that the role of international law in the current world had assumed fundamental importance. In the post-cold-war era and the remaining years of the United Nations Decade of International Law, it was imperative that the codification of international law and its progressive

development should take into account the views of developing nations. Moreover, the General Assembly should be encouraged to propose new topics of international law for the Commission's consideration for the purpose of codification. The progressive development of international law was an evolving process and should reflect the principles of law acceptable to the vast majority of nations. In addition, cooperation between the Commission and other legal bodies, including the Asian-African Legal Consultative Committee, should be further enhanced in order to broaden the base and scope of the items on the Commission's agenda.

32. Lastly, his delegation expressed its appreciation to the Commission for holding the International Law Seminar at the Palais des Nations from 17 June to 5 July 1996, which had been funded by voluntary contributions from Member States. It was hoped that those seminars would continue to be held since they greatly benefited participants from developing nations.

33. Mr. FOZEIN (Cameroon) said that recent cases of succession of States had frequently occurred in circumstances which had seriously affected acquired rights, especially with regard to the nationality of natural and legal persons. In view of the uncertainty resulting from that situation, a legal framework must be established as soon as possible relating to State practice in granting nationality and taking into account the exclusive jurisdiction of States based on territorial sovereignty.

34. At the current time, the question of nationality in cases of State succession was dealt with in a casuistic manner. Each national legislation established its own rules concerning natural persons, with the sole obligation of observing international custom and generally recognized legal principles, particularly the 1993 Hague Convention concerning specific questions relating to conflicts of laws on nationality.

35. The question of the nationality of legal persons was much more complicated since most countries did not have specific legislation on that subject.

36. Cameroon supported the Commission's decision to consider separately the two questions and give priority to the question of natural persons since there was a set of practices in that regard which could serve as a basis for the Commission's work and there was also a clear link with the protection of human rights.

37. He noted with satisfaction that the principles adopted in the Commission's report tended to place the right of a natural person to nationality in cases of State succession in the category of a basic right.

38. The concept of "States concerned" (A/51/10, para. 86) could give rise to all kinds of interference by third States. From the legal point of view, the expression "States involved in the State succession" seemed more precise.

39. He noted with satisfaction the obligation of the successor State mentioned in paragraph 86 (c) of the Commission's report, but considered that the right of option should be exercised within a specific period of time, never shorter than five years from the promulgation of the legislation in question.

40. The right to family reunification referred to in paragraph 86 (j) of the report might cause some problems. He suggested replacing the expression "reasonable measures" with the phrase "necessary measures", a concept which would involve the obligation of Governments to do everything possible to promote family reunification and at the same time would make it possible to assess the more or less reasonable nature of the necessary measures.

41. The Commission had suggested that the result of its work should take the form of a declaration (A/51/10, para. 88 (b)). In view of the tragic situation in which many persons were living in various parts of the world because of problems caused by State succession resulting from armed conflicts and the ergo omnes obligation to protect human rights, without detriment to the provisions of General Assembly resolution 48/31 of 9 December 1993, it would seem more appropriate to submit to the General Assembly a binding legal instrument instead of a body of guidelines which would leave the question to the total discretion of States.

ORGANIZATION OF WORK

42. In reply to a question raised by Mr. ROGACHEV (Russian Federation), the CHAIRMAN said that, although the Committee's programme of work had not been finalized, it would include all the items that were pending.

The meeting rose at 11.30 a.m.